

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TERESA L. THOMPSON**

Claimant

VS.

**HALLMARK CARDS, INC.**

Self-Insured Respondent

Docket No. 244,719

**ORDER**

Respondent requests review of an Order entered by Administrative Law Judge (ALJ) Brad E. Avery on June 11, 2003.

**APPEARANCES**

Chris Miller of Lawrence, Kansas, appeared for the claimant. John David Jurcyk of Roeland Park, Kansas, appeared for respondent.

**ISSUES**

Respondent appeals the ALJ's award of \$3,281.61 in attorney fees on a post-award request for additional medical treatment. Respondent maintains the affidavit offered in support of claimant's counsel's request for fees should be disregarded as it was not properly placed into evidence. Respondent also argues the applicable statute, K.S.A. 44-536(g), entitles an attorney to fees only "subsequent to the ultimate disposition of the initial and original claim." Respondent maintains the claim was ultimately concluded on July 11, 2002, when the respondent's petition for review was denied by the Kansas Supreme Court. Thus, respondent contends no fees can be awarded until after that date.

Claimant contends the statute permits an award of attorney fees for time incurred on a post-award request for medical treatment regardless of respondent's efforts to appeal. Claimant's counsel further asserts his affidavit was properly considered by the ALJ and the Order granting attorney fees should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

On December 22, 2000, the ALJ issued an Award which denied any benefits to claimant. Claimant appealed that denial to the Board and on June 28, 2001, the ALJ's Award was reversed and benefits were granted, including the right to request future medical benefits. Respondent appealed that determination to the Kansas Court of Appeals. On February 1, 2002, while the respondent's appeal was pending, claimant filed a post-award request for medical treatment pursuant to K.S.A. 44-510k. The ALJ heard that matter on March 5, 2002, and following the submission of evidence, an Order for Medical Treatment was entered on June 14, 2002, granting claimant's request for treatment. The Kansas Court of Appeals affirmed the Board's June 28, 2001 Order on March 29, 2002. Thereafter, on July 11, 2002, the respondent's petition for review was denied by the Kansas Supreme Court.

On February 3, 2003, claimant filed a Motion to Assess Attorney Fees. Attached to that motion was an affidavit and an itemized bill reflecting 28.0 hours of attorney and legal assistant time and \$1,079.61 in expenses. That motion was heard on April 15, 2003, and an Order was entered on June 11, 2003, granting claimant's counsel's request for fees and expenses in the sum of \$3,281.61.

Respondent's argument that K.S.A. 44-536(g) prohibits an award of attorney fees until after the Kansas Supreme Court denied respondent's appeal is without merit. K.S.A. 44-536(g) provides in part:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services. . .

The Kansas Workers Compensation Act permits a claimant to request post-award benefits independent of a respondent's appeal. K.S.A. 2002 Supp. 44-556. In connection with such a request, K.S.A. 44-536(g) authorizes an award of attorney fees. The purpose of this statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.<sup>1</sup>

Respondent's statutory argument in this matter is misplaced. The phrase "subsequent to the ultimate disposition of the initial and original claim" logically refers to the

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<sup>1</sup> See K.S.A. 44-536(g).

underlying award and not to any appeals that might follow. If respondent's argument were to prevail, then all any respondent need to do to avoid any post-award claim for attorney fees would be to appeal the claim. Obviously, this result would encourage frivolous appeals, all to a claimant's detriment. Moreover, injured workers' access to medical treatment would be jeopardized. Such is contrary to the intent of the Workers Compensation Act. Indeed, the Legislature recently enacted K.S.A. 44-510k, which provides in pertinent part:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. . . .<sup>2</sup> (Emphasis added.)

This procedure is predicated solely upon "the entry of an award for compensation" and does not require an employee to wait until all appeals have been exhausted.

The Board issued its Order, overturning the ALJ's denial of benefits, on June 28, 2001. That Order included the right to request further medical treatment pursuant to the procedure set forth in K.S.A. 44-510k. Respondent's argument regarding the prematurity of this request is rejected.

As for the evidentiary objection to claimant's counsel's affidavit and itemized bill, this argument is likewise unpersuasive. The evidentiary standards in workers compensation are somewhat relaxed, given the administrative nature of the proceedings. The affidavit and billing itemization were filed along with claimant's motion and served upon opposing counsel.

The Board finds the method employed by claimant's counsel is generally acceptable and typical of the practice. The motion was filed and accompanied by a billing summary itemizing the time spent on the post-award issue. This billing summary was supported by an affidavit and served upon opposing counsel. If there was any objection to the affidavit or the contents of the bill, they were not asserted prior to the entry of the ALJ's Order. Had there been some concern about the propriety of the fees being sought, the logical venue to air those complaints would have been before the ALJ. That was not done and, as such, any complaints now asserted are deemed to have been waived. At oral argument before the Board, respondent's counsel confirmed it has no objection to the billing entries. In fact, the only objection made stems from the evidentiary procedure employed to bring the issue before the ALJ.

The Board finds the affidavit and the billing summary were properly considered by the ALJ and finds no reason to disturb the amount of the attorney fees awarded by the ALJ.

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<sup>2</sup> K.S.A. 2002 Supp. 44-510k.

There is, however, an issue regarding the expenses claimant seeks to have reimbursed. K.S.A. 44-536(g) makes no reference to expenses. However, K.S.A. 2002 Supp. 44-510k(c) allows for the award of costs when post-award litigation occurs on a claimant's behalf. "Costs" as described in that statute are defined as including:

. . . but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs. (Emphasis added.)

The language of K.S.A. 2002 Supp. 44-510k(c) indicates that the list is not all inclusive and the Board has concluded that attorney travel expenses including mileage, photocopying and telephone expenses may be considered as appropriate "costs." However, the expenses associated with a medical appointment with Dr. Edward J. Prostic and his subsequent reports must be denied. Dr. Prostic was the physician selected by claimant's counsel and utilized to justify her claim for additional post-award medical treatment. He testified by deposition and not pursuant to any sort of subpoena as is contemplated by K.S.A. 2002 Supp. 44-510k(c). Fees charged by treating physicians for appearance and testimony at trial are generally not assessed against the losing party as costs.<sup>3</sup> Therefore, the ALJ's Order must be modified to deny claimant reimbursement for the \$900 paid to Dr. Prostic.

### **AWARD**

**WHEREFORE**, Administrative Law Judge Brad E. Avery's Order dated June 11, 2003, is modified and claimant is granted \$2,381.61 in attorney fees and expenses in association with claimant's request for post-award medical benefits.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>3</sup> *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723, rev. denied 260 Kan. 992 (1996).

c: Chris Miller, Attorney for Claimant  
John David Jurcyk, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director